Supreme Court, U.S.
FILED

011820 JUN 11 2002

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No. 01-

IN THE

Supreme Court of the United States

JOSE L. RODRIGUEZ, SERGEANT,
UNITED STATES ARMY,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER PETITIONER'S RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT WAS VIOLATED WHEN THE GOVERNMENT, WITH THE COMPLICITY OF THE MILITARY JUDGE AND OVER DEFENSE COUNSEL'S REPEATED OBJECTION, KNOWINGLY PERSISTED IN PRESENTING A FALSE AND MISLEADING PICTURE OF THE EVIDENCE TO THE COURT-MARTIAL PANEL.

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CONSTITUTIONAL PROVISION:

U.S. Const., amend. V 2, 7

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

The petitioner, Jose L. Rodriguez, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 56 M.J. 336 (2002)(Appendix A). The decision of the United States Army Court of Criminal Appeals is unpublished. (Appendix B).

JURISDICTION

The judgment for the Court of Appeals for the Armed Forces was entered on March 13, 2002 (Appendix A). The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1259 (3); the United States Court of Appeals for the Armed Forces having reviewed this case pursuant to Uniform Code of Military Justice Article 67(a)(3), 10 U.S.C. § 867(a)(3).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves:

1. The Fifth Amendment to the United States Constitution which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Procedural History:

On April 2, May 29, and June 1-5, 1998, Sergeant Jose Rodriguez was tried at Schofield Barracks, Hawaii, before a general court-martial composed of officers and enlisted personnel. Contrary to his plea, Sergeant Rodriguez was found not guilty of premeditated murder, but guilty of murder while engaging in an act inherently dangerous to another, in violation of Uniform Code of Military Justice [U.C.M.J.] Article 118(3), 10 U.S.C. § 918(3) (1996). Sergeant Rodriguez was sentenced to thirty years confinement, reduction to the lowest enlisted grade, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the adjudged sentence, waived the forfeitures for a period of six months, and credited Sergeant Rodriguez with 151 days of confinement

credit. On October 24, 2000, after oral argument, in a short-form opinion, the Army Court of Criminal Appeals affirmed the findings of guilty and the sentence. (Appendix B.)

On April 24, 2001, the United States Court of Appeals for the Armed Forces granted review on the following issue:

> WHETHER THE MILITARY JUDGE ERRED BY ADMITTING CERTAIN PORTIONS OF PETITIONER'S ADMISSIONS TO THE POLICE WHILE DISALLOWING OTHER PORTIONS.

The Court of Appeals for the Armed Forces rendered its opinion of March 13, 2002 (Appendix A), affirming the findings and sentence of the United States Army Court of Criminal Appeals.

STATEMENT OF FACTS

Sergeant Rodriguez' and his wife Angela's marriage was in trouble. (Record [R.] at 180, 187, 208, and 209.) Angela and her sister, Yvonne, went out together on New Year's Eve, 1997, and stayed out all night. Angela did not go out with her husband. (R. at 166.) On January 1, 1998, her husband's birthday, Angela did not return home from work to attend her husband's birthday barbecue and again stayed out very late. (R. at 196-7.) On January 2, 1998, Angela went out to several bars/clubs with friends and again stayed out all night, sleeping in another man's hotel room. (R. at 167-170.) Angela was openly cheating on her husband. (R. at 179.) Understandably, Jose was less than pleased with his wife's behavior. (R. at 208-9.) In the early morning of January 3, 1998, after being told that his wife was at a bar with "some guy," Jose waited at his wife's sister's house for his wife to return. When they returned from their night out, Angela and Jose drove home. Shortly thereafter, Angela died from anoxia of the brain due to some sort of choke hold. (R. at 397; Prosecution Exhibit 60.)

At 9:46 pm, on January 6, 1998, Sergeant Jose Rodriguez confessed to killing his wife.

> She then started assaulting me, pushing me, punching me . . . I remember I got [her] in this combat hold, and I told her to stay still and stop – stop hitting me. Before I knew it, she wasn't moving anymore. I let her go. She's – she looked lifeless, and I was scared
>
> . . . .
>
> I told her [Angela's mother] that me and Angela were abducted, instead of just telling her the truth. I don't know, I just – I couldn't just tell her what happened, not to her own daughter, out of respect to her . . . it was just a lie, because I couldn't face up to her. There was no way I could . . . I couldn't face up to it.

(R. at Defense Exhibit Z for Identification, 73-page transcript of petitioner's taped interview with the Honolulu Police Department.) Then, at 10:32 am of the next day, January 7, 1998, the petitioner also admitted to "messing up" his house to appear as if "somebody broke in" and painting the walls to "make it look like somebody had broken into the house, and me and my wife were dead." (R. at Defense Exhibit Z for Identification, 42-page transcript of petitioner's taped interview with the Honolulu Police Department.) Thus, after his wife died, Sergeant Rodriguez went into a panic and staged his house so that it would look like a break-in, gang-related vandalism, a burglary attempt, and an abduction.

The prosecution introduced multiple statements given by the petitioner in which he gave a false version of the events leading up to his wife's death. (R. at 235, 280-305.) The government chose not to introduce the statements in which petitioner admitted that he lied and explained how his wife actually died. The defense repeatedly tried to introduce these statements in an effort to ensure that the panel had a complete version of the petitioner's conduct after his wife's death. (R.

at 162; 274-80.) However, the military judge refused to allow these statements to be introduced. (R. at 450-456; 573-596.)

REASONS FOR GRANTING THE WRIT

This case offends all notions of fairness and integrity on which the criminal justice system is based. It stands for the proposition that the government is allowed to deliberately mislead the finder of fact. Stripped to its core, the government's strategy of proving petitioner's guilt consisted of presenting a false picture to the court-martial panel that petitioner had repeatedly lied about how his wife died without any attempt to provide the true story. Essentially, the prosecutors introduced a statement which petitioner had already admitted was a lie, objected to the introduction of the confession to that lie, proved the lie to be false, and then argued that petitioner's false statements demonstrated that he had intentionally killed his wife. The military judge was fully aware of the government's scheme to deceive the court-martial members, yet he did nothing to ensure that truth was a priority in petitioner's trial. In fact, after the government presented petitioner's initial story to the panel and proved it to be false, the military judge fortified the government's case by instructing the panel members on false exculpatory statements. (R. at 613, 624.) This directly contradicts any logical idea of "due process."

The prosecution was very open about how it planned to secure a conviction in this case. During its opening statement, the government revealed that it would show petitioner's intent to commit murder through "his words and his actions in the days after the murder when he tried to cover up what he had done." (R. at 140.) Unfortunately, the government never intended to provide the court-martial panel members with a complete picture of petitioner's words in the days after his wife's death. The prosecutor successfully and repeatedly

blocked the admission of petitioner's detailed, subsequent confessions and explanations. (R. at 450-456; 573-596.)

Throughout the trial, the defense tried to provide the factfinder with the complete story. (R. at 162; 274-80.) The prosecution admitted into evidence various false, exculpatory statements by the accused to his mother-in-law and the police that he and his wife and been violently abducted and kidnapped. (R. at 235, 280-305.) The government chose not to introduce evidence that, within 24 hours of those initial statements, petitioner gave two detailed accounts (a 73-page, taped interview and a 42-page, taped interview) of exactly what had transpired. (R. at Defense Exhibit Z for identification.) These accounts explain the mutual affray, his wife's assaults against him, his restraint of her, her unexpected death, his unsuccessful attempts to revive her, his remorse and consequent panic and confusion, the staging of the scene at his house, and his fabrications.

The defense attempted to admit these statements through various witnesses, but the military judge consistently ruled that the accused's confessions were not going to be entered into evidence without the accused taking the stand. (R. at 279-80, 432, 570-77, 595-99.) The defense counsel correctly characterized the government's tactic in the following way:

> They're only showing part of the admission, because the admission lasted several days.... the government is intentionally trying to hide the ball here. They're intentionally trying to mislead the panel into this fictitious – that this was his story. And it wasn't his story. It was only a small portion of his story of the events. The HPD knows that and the prosecutor knows that, and by limiting – by only presenting, "Oh well, this was his story to you?" "Yes, this was his story to us," they're trying to mislead the panel that

> that was his complete story. That wasn't his complete story.

(R. at 278, 279.)

The Fifth Amendment to the United States Constitution guarantees all persons accused by the government of committing criminal offenses that they will not "be deprived of life, liberty, or property, without due process of law." This Court has interpreted this provision to mean that a criminal defendant must be treated with the "fundamental fairness essential to the very concept of justice." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982)(citation omitted). *See also Rochin v. California*, 342 U.S. 165, 172 (1952)(governmental conduct which "shocks the conscience" or "offend[s] even hardened sensibilities" violates due process).

An analysis of due process requires in-depth scrutiny into the fundamental fairness exhibited by the government toward the individual accused, regardless of how other individuals under similar circumstances may have been dealt with by the prosecution in the past. *Ross v. Moffitt*, 417 U.S. 600, 609 (1973). When the government "brings its judicial power to bear" on an individual, the accused must be given a meaningful opportunity to present his defense and must be treated fairly and evenhandedly by his accusers. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

This Court has recognized the "principle that due process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections." *Moran* v. *Burbine*, 475 U.S. 412, 467 (1986)(Stevens, Brennan, and Marshall, JJ., dissenting). In that vein, this Court has found a variety of circumstances where criminal proceedings lack the element of fundamental fairness and thus violate an accused person's right to due process of law. See, e.g., *Wainwright v. Greenfield*, 474

U.S. 284, 295 (1986)(use of a suspect's post-Miranda warnings silence against him violates due process); *Blackledge v. Perry*, 417 U.S. 21, 26 (1974)(vindictive prosecution violates due process); *Brady v. Maryland*, 373 U.S. 83, 86 (1963)(stating "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

Moreover, it is well established that an accused's right to due process is violated where government evidence misleads the trier of fact. *See Mooney v. Holohan*, 294 U.S. 103, 112 (1935)(holding that a prosecutor's knowing presentation of false testimony is "inconsistent with the rudimentary demands of justice"); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957)(holding that a due process violation occurs when a prosecutor fails to correct testimony he knows to be false even when the falsehood in the testimony goes only to the witness's credibility); *Giglio v. United States*, 405 U.S. 150, 155 (1972)(holding that due process required new trial where government witness testified falsely on matters relating to credibility and the prosecutor should have been aware of the falsehood). The conduct of the government and the military judge in this case flies in the face of this principle.

The defense attempted to ensure that the trier of fact was given the whole truth by introducing petitioner's confession using the rule of completeness, found in Military Rule of Evidence [M.R.E.] 304(h)(2). This rule, which has no counterpart in the Federal Rules of Evidence, states that "[i]f only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement." M.R.E. 304(h)(2). The policy behind this rule of completeness is to present statements that ought in fairness be considered contemporaneously with the statement introduced. *See United States v. Morgan,* 15 M.J. 128 (C.M.A. 1983).

Similarly, the common law rule of completeness was designed to prevent one side from misleading the trier of fact. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988).

In the present case, the government intentionally created the incorrect impression that Sergeant Rodriguez' last words to the police were his fabrications. That is simply not the case. Sergeant Rodriguez completed his story and admitted his previous fabrications, yet the prosecution actively concealed the truth from the trier of fact. In fact, the government expert witness testified, "The accused had confessed to a choke hold on the neck and he had demonstrated what appeared to be to me like a carotid, sleeper hold." (R. at 435.) At that point, the government received the benefit of informing the panel that Sergeant Rodriguez had confessed to placing his wife in a choke hold. Yet, the government, with the military judge's concurrence, successfully withheld from the factfinder the statements in which petitioner explained how and why he applied the choke hold to his wife. Therefore, at that point, due process requires the accused be given the opportunity to introduce the remaining portions of his statement. He was denied that opportunity.

In this case, when confronted with the option of providing true or false information to the factfinder, the prosecution chose the latter. What is so alarming is that the government went beyond simply not providing the whole story. Instead, they selectively withheld information in a calculated strategy designed to skew the truth. This raises the vital question of whether a trial counsel's duty to prosecute within our adversarial system is a duty to convict or a duty to seek justice and truth. Surely, this Court will not condone a tactic specifically designed to conceal the truth rather than reveal it.

As this Court has stated, the American prosecutor plays a "special role" in the search for truth in criminal trials because he is "the representative not of an ordinary party to a

controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Strickland v. Greene*, 527 U.S. 263, 281 (1999)(citation omitted). The ruling of the Court of Appeals condones the government's deliberate efforts to win without regard for the cost to justice.

CONCLUSION

The prosecution and the military judge should have provided the factfinder with a more truthful and complete picture of the petitioner's conduct after his wife's death, rather than the deliberately false one they chose to present.

WHEREFORE, petitioner requests this Court set aside the finding of guilty and the sentence and remand the case for a new trial.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee
v.
Jose L. RODRIGUEZ, Sergeant
U.S. Army, Appellant

No. 01-0130
Crim. App. No. 9800800

Argued October 3, 2001
Decided March 13, 2002

EFFRON, J., delivered the opinion of the Court, in which CRAWFORD, C.J., and GIERKE and BAKER, JJ., joined. SULLIVAN,S.J., filed an opinion concurring in part and in the result.

Military Judge: Stephen V. Saynisch

Judge EFFRON delivered the opinion of the Court.

A general court-martial composed of officer and enlisted members convicted appellant, contrary to his pleas, of murder while engaging in an act inherently dangerous to another, in violation of Article 118, Uniform Code of Military Justice (UCMJ), 10 USC § 918. He was sentenced to a dishonorable discharge, confinement for thirty years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the adjudged sentence, waived the forfeitures for a period of six months, and provided appellant with 151 days of confinement credit. The Army Court of Criminal Appeals

affirmed the findings and the sentence in an unpublished opinion.

On appellant's petition, we granted review of the following issue:

> WHETHER THE MILITARY JUDGE ERRED BY ADMITTING CERTAIN PORTIONS OF APPELLANT'S ADMISSIONS TO THE POLICE WHILE DISALLOWING OTHER PORTIONS.

We affirm for the reasons set forth below.

I. *Background*

A. *Appellant's Seven Statements*

Appellant's wife, Angela, died on January 3, 1998. The autopsy report indicated that her death resulted from suffocation due to a choke hold. Appellant did not contact anyone concerning his wife until two days later, on January 5, when he called his mother-in-law from a pay phone. In the first of seven statements he would make over a three-day period, appellant told his mother-in-law that he and Angela had been abducted. He added that he had been hit over the head, which rendered him unconscious. He also told his mother-in-law that he did not know where his wife was, and that she had been bound and gagged in a car the last time he saw her.

After speaking with his mother-in-law, appellant made a "911" telephone call for emergency assistance. During the 911 call, appellant made his second statement during the following exchange with the 911 dispatcher:

> Q: Police, may I help you?
>
> A: Yes, my name is Jose.
>
> Q: Yes.

A: And right now I don't know where I'm in – me and my wife were burglarized at home.

Q: What happened now?

A: All I could remember is that me and my wife, we got home and my house was burglarized or whatever because I got knocked out.

Q: Somebody came to your house?

A: I'm not even at the house. I'm somewhere – I don't even know where I'm at.

Q: I know where you are, but somebody came to your house?

A: I don't know, it seemed like two or three people – I don't know. This happened a while ago. This happened in the evening time –

Q: Wait, wait. Will you speak into the phone? I can hardly hear you.

A: I don't know if this happened before or what. I mean like tonight or the night before that. I don't even know what time it is or nothing like that.

Q: You were passed out?

A: I got knocked out, my head hurts.

* * *

Q: So, you regained consciousness just now?

A: I've been on and off. I just walked about – I don't know how long I walked to get a phone.

When officers from the Honolulu Police Department responded to appellant's 911 call, he made a third statement, which

generally repeated the information in his call to the 911 dispatcher.

Later during the morning of January 5, appellant made his fourth statement during a formal interview with Honolulu police detective Philip Camaro from the Missing Persons/Homicide Unit. At this point, the body of appellant's wife had not yet been discovered and Detective Camaro was investigating Angela's disappearance as a missing person case. Detective Camaro testified that during this interview, appellant stated that

> two males attacked him and that... his head was covered with a bag and he was tied up and that as a result of the attack he was – found himself slipping in and out of a state of unconsciousness.
>
> * * *
>
> The next thing he recalls is he's in some car still bound, still with a bag over his head and the vehicle had stopped. It was dark. The males then removed him from the car. During this process he was able to kick one of the males and force himself free and as he was running away he was still – he had loosened his bounds [*sic*] while in the car but he was able to loosen the rope and he was able to hop away and then eventually remove the rope and remove the bag. Mr. Rodriguez also claimed that as he was fleeing or escaping he heard two or three shots fired in his direction.

Appellant told Detective Camaro that the last time he heard from his wife, she was upstairs in their home screaming while under attack by the intruders. Police officers later discovered Angela Rodriguez's body in the back seat of the Rodriguez family car, which was located approximately one mile from the pay phone where appellant made the 911 call.

By the next day, January 6, the police determined that there were inconsistencies in appellant's first four statements. In addition, their review of the evidence recovered at appellant's home indicated that the "burglary" had been staged. As a result, the police conducted an interview of appellant on January 6, when he made his fifth statement.

Later on January 6, appellant made his sixth statement during a custodial interview with Honolulu police detectives Tamashiro and Wiese. In this statement, he confessed to killing his wife and fabricating his previous statements to cover up the crime. The interview was taped, and a seventy-three-page transcript was produced. The next day, January 7, Detectives Tamashiro and Wiese conducted another taped, custodial interview, at which appellant made his seventh statement. In this statement, which resulted in a forty-two-page transcript, appellant reiterated his confession.

B. *Trial Proceedings*

At trial, the prosecution sought to prove the murder charge by asking the panel to draw an inference of guilt from the untruthful nature of appellant's first four exculpatory statements. The prosecution's evidence included a tape of appellant's 911 call, the testimony of his mother-in-law, the testimony of Detective Camaro, and the testimony of Honolulu police officer Eric Zarielo, who responded to appellant's 911 call. The prosecution also offered expert testimony from Dr. Bani Win, the Honolulu deputy medical examiner, to establish the cause and manner of Angela Rodriguez's death. Dr. Win, who conducted the autopsy, testified that Angela's death was due to "suffocation or asphyxia due to some sort of choke hold to the neck." The Government did not introduce evidence of appellant's fifth, sixth, or seventh statements as part of its case-in-chief.

The defense sought to convince the panel that the death was the result of an accident during a domestic dispute that escalated into a physical confrontation in which appellant's wife was the aggressor. Although appellant did not testify, the defense attempted to introduce his testimony through appellant's sixth and seventh statements, the taped custodial interviews conducted on January 6 and 7 by Detectives Tamarshiro and Wiese. Trial counsel objected that these statements constituted inadmissible hearsay. Defense counsel responded that the statements were admissible under the rule of completeness. Defense counsel contended that the statements constituted a single admission over a period of days, and that the sixth and seventh statements should be introduced under the rule of completeness. The military judge rejected the defense position and ruled that the sixth and seventh statements were not admissible.

II. *The Rule of Completeness*

The rule of completeness, which has its roots in common law principles of evidence, has two purposes: (1) to ensure "that the court not be misled because portions of a statement are taken out of context," and (2) to avoid "the danger that an out of context statement may create such prejudice that it is impossible to repair by a *subsequent* presentation of additional material." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 n.14 (1988); *see* 7 *Wigmore on Evidence* § 2113 at 653 (Chadbourn rev. 1978).

Prior to the adoption of the Military Rules of Evidence in 1980, the military justice system had a limited rule of completeness applicable to confessions introduced against an accused, but did not have a general rule of completeness applicable to other forms of evidence. *See* para. 140a(6), Manual for Courts-Martial, United States, 1969 (Revised ed.);

Stephen A. Saltzburg, Lee D. Schinasi, & David A. Schlueter, Military Rules of Evidence Manual 93 (4th ed. 1997).

Under the Military Rules of Evidence adopted in 1980, there are two distinct rules of completeness. Rule 106, the general rule of completeness, is virtually identical to its federal civilian counterpart, FED. R. EVID. 106. Rule 304(h)(2), which applies when a confession or admission is introduced against an accused, has no express counterpart in the Federal Rules of Evidence. Although there are similarities between the two military rules, there are also significant differences in terms of purpose and scope.

A. *Military Rule of Evidence 106*

MIL. R. EVID. 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Manual for Courts-Martial, United States (2000 ed.).*

Rule 106 may be invoked by either the prosecution or defense to address matter introduced by the opposing party. The "primary concern of Rule 106 is the order of proof," permitting an adverse party to compel the introduction of favorable evidence during the opponent's case. 1 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence*, § 106.02[2] at 106-11 (Joseph M. McLaughlin ed., 2nd ed. 2001). As such, the rule "permits one party to require another party to introduce more evidence than the latter desires, or have the latter's case

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* All current Manual provisions cited herein are identical to the ones in effect at the time of appellant's court-martial.

interrupted so that the additional evidence can be introduced." Saltzburg et al., *supra* at 92. Although an adverse party seeking to introduce evidence for purposes of completeness has the right to have the remaining evidence introduced contemporaneously with the proponent's evidence, the adverse party, for tactical reasons, may wait until later in the proceedings to introduce the evidence. *See id.*

Rule 106 applies only to evidence that "ought in fairness to be considered contemporaneously" with the proponent's evidence, and does not necessarily require that the entire document be admitted into evidence. *See* Weinstein, *supra*, § 106.03[1] at 106-17; Saltzburg et al., *supra* at 92-93; *United States v. Cannon*, 33 MJ 376, 383 (CMA 1991). When a misleading impression might be created by introducing a document without accompanying documents or related correspondence, Rule 106 requires consideration as to whether the situation is one in which the proponent should compelled "to offer into evidence the entire correspondence or all accompanying documents that ought to be considered contemporaneously with the writing being introduced into evidence." Weinstein, *supra*, § 106.04[1] at 106-19; *see also United States v. Maracle*, 26 MJ 431 (CMA 1988); *United States v. Salgado-Agosto*, 20 MJ 238 (CMA 1985).

The courts are split as to whether Rule 106, in addition to governing timing, also permits the introduction of evidence that otherwise would be inadmissible. *See* Weinstein, *supra*, § 106.03[1] at 106-14; 1 Barbara E. Bergman & Nancy Hollander, *Wharton's Criminal Evidence* § 4:10 at 317-19 (15th ed. 1997). To the extent that otherwise inadmissible evidence may be introduced, it comes in only at the insistence of the adverse party, who may waive the benefit of the rule. *See* Saltzburg et al., *supra* at 92-93.

Because Rule 106 applies only to "a writing or recorded statement," it does not cover oral statements. However, to the extent that Rule 106 is concerned with timing rather than admissibility, several commentators have observed that the judge may rely on Rule 611(a), regarding control over the mode and order of proof, to achieve the same effect as Rule 106 with respect to the time at which evidence may be introduced for purposes of "completeness." *See* Weinstein, *supra*, § 106.02[2]; Bergman & Hollander, *supra* at 313-14.

B. *Military Rule of Evidence 304(h)(2)*

Rule 304(h)(2) provides:

> If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement.

The President's decision that the general provisions of Rule 106 should be supplemented by a specific rule of completeness for confessions or admissions introduced against the accused reflects longstanding military practice. *See* William Winthrop, *Military Law and Precedents* 327 (2d ed. 1920 Reprint) ("a confession, to be admitted, must be offered in its *entirety*, so that the whole may be taken together, and the complete purport may fully appear"); *see also* para. 225, Manual for Courts-Martial, U.S. Army, 1917; para. 114a, Manual for Courts-Martial, U.S. Army, 1928; para. 175, Naval Courts and Boards, 1937; para. 127a, Manual for Courts-Martial, U.S. Army, 1949.

Following enactment of the UCMJ, the President incorporated the rule of completeness with respect to confessions or admissions in paragraph 140a of the Manual for Courts-Martial United States, 1951, as follows:

> If only part of a confession or admission (or supposed confession or admission) is shown, the defense by

> cross-examination or otherwise may show the remainder of the statement.

In *United States v. Harvey*, 8 USCMA 538, 546, 25 CMR 42, 50 (1957), our Court emphasized the fairness component of the rule of completeness: "It would be manifestly unfair to an accused to permit the prosecution to pick out the incriminating words in the statement or discussion and put them in evidence while at the same time excluding the remainder of the statement or conversation, in which the accused seeks to explain the incriminating passages." When an oral admission and a written confession are involved, the issue is "whether the accused's written statement is separate and unrelated from the oral confession, or whether it is part of or the product of the same transaction or course of action." *Id.*

Harvey also identified the outer limit of the rule's coverage, stating that "a separate statement or utterance of an accused, which is totally disconnected or unrelated to the statement containing the confession is not admissible as part of such statement." *Id.* With respect to the issue of whether two statements might be sufficiently connected so as to require the second to be admitted under the rule of completeness, the opinion noted that "the elapsed time between the two statements . . . is but one factor -- although an important one – to be considered in every case." *Id.* at 546-47, 25 CMR at 50-51. As an example of a situation in which a subsequent statement was held to be admissible under the rule of completeness, the opinion cited *State v. Netherton*, 279 P. 19 (Kan. 1929), in which the defendant had executed a written statement addressing questions from a sheriff that had been asked and answered over a period of several days. *Id.* at 547, 25 CMR at 51.

In *Harvey*, we applied the foregoing considerations to a written statement executed nine days after an oral confession, and stating:

> All factors considered, including the elapsed time of nine days between the oral confession and the written statement, that the statement was made at the specific request of counsel, and that the greater part of the statement related to matter wholly unconnected with the offense and with the subject matter of the oral confession, we believe the written statement was unrelated to and constituted no part of the oral confession.

Id. at 548, 25 CMR at 52.

The subsequent edition of the Manual reflected *Harvey*'s approach to the rule of completeness in the context of confessions and admissions:

> If only part of a confession or admission or supposed confession or admission of the accused is shown, the defense by cross-examination or otherwise may introduce all other parts of the statement – which may consist of a connected series of statements – that are explanatory of, or in any way relevant to, that part.

Para. 140a(6), 1969 Manual, *supra*. In other words, although a confession may be contained within a statement, aspects of the statement that were not part of the confession or otherwise explanatory of or in any way relevant to the confession were not admissible under the Manual's rule of completeness.

When the President promulgated the Military Rules of Evidence in 1980, the rules not only adopted the general rule of completeness in FED. R. EVID. 106, but also included Rule 304(h)(2), thereby continuing the special treatment of confessions in the military justice system. The Drafters'

Analysis noted that Rule 304(h)(2) was "taken without significant change" from paragraph 140a(6) of the 1969 Manual. Manual, *supra* (2000 ed.) at A22-13. The Analysis also observed that in contrast to Rule 106's focus on written statements by an adverse party, Rule 304(h)(2) "allows the defense to complete an incomplete statement regardless of whether the statement is oral or in writing." *Id.*

The foregoing history indicates that Rule 304(h)(2): (1) applies to oral as well as written statements; (2) governs the timing under which applicable evidence may be introduced by the defense; (3) permits the defense to introduce the remainder of a statement to the extent that the remaining matter is part of the confession or admission or otherwise is explanatory of or in any way relevant to the confession or admission, even if such remaining portions would otherwise constitute inadmissible hearsay; and (4) requires a case-by-case determination as to whether a series of statements should be treated as part of the original confession or admission or as a separate transaction or course of action for purposes of the rule.

C. *Rules 106 and 304(h)(2) Compared*

Rules 106 and 304(h)(2) both require an initial determination that a party has introduced an incomplete item. If the item is incomplete, then the opposing party may invoke Rule 106 or 304(h)(2), as appropriate, to ensure that the court-martial is not provided with a misleading portrayal of the initial statement. There are four major differences between Rule 106 and Rule 304(h)(2). First, the general rule of completeness in Rule 106 may be used by any party, but Rule 304(h)(2) may be invoked only by an accused, and only after the prosecution has introduced an alleged admission or confession. Second, Rule 106 applies only to documents and recordings, while Rule 304(h)(2) also covers oral statements. Third, Rule 106 is primarily concerned with timing, permitting a party to compel

an opponent to introduce matter during the opponent's case-in-chief, while Rule 304(h)(2) is primarily concerned with authorizing the introduction of the substance of the "remaining portions of the statement" at issue. Fourth, Rule 106 provides the military judge with discretion to determine whether the additional material "ought in fairness" be considered with the original matter, whereas Rule 304(h)(2) requires admission of the "remaining portions of the statement" if such material falls within the criteria set forth under the rule and applicable case law.

III. *Discussion*

We review a military judge's decision to admit or exclude evidence for abuse of discretion. *United States v. Ayala*, 43 MJ 296, 298 (1995). Appellant contends that when the prosecution introduced appellant's first four statements – the fabricated stories of a burglary and abduction – the military judge erred in not permitting appellant to introduce his sixth and seventh statements – the transcripts of his custodial interviews – under the rule of completeness.

The prosecution provided evidence of appellant's first four statements through the recorded 911 call and the testimony of his mother-in-law, Detective Camaro, and Honolulu police officer Zarielo. Each of these statements was made during a discrete, complete event. Appellant has not shown, with respect to any of these communications, that he was somehow precluded from completing the content of his statements. Appellant's subsequent statements, which he sought to introduce at trial under the rule of completeness, were made at a different time, at a different place, and to a different set of persons. Although the latter statements may rebut, explain, or modify the content of his earlier statements, they are not admissible under the rule of completeness because they were not part of the same transaction or course of action.

Rule 304(h)(2) is designed to protect an accused from the prosecution's misleading use of excerpts of an admission or confession. It does not permit an accused to engage in a pattern of deception with a variety of persons, and then argue that belated candor in a different setting justifies the introduction of otherwise inadmissible hearsay.

In the present case, the defense sought to introduce appellant's sixth and seventh statements as the basis for contending that his wife's killing was accidental. The Government's trial strategy, which did not involve introduction of those statements as part of its case-in-chief, thwarted that plan. As a result, the defense had to choose between putting appellant on the stand, which would have subjected him "to the crucible of cross-examination," *United States v. Stark*, 24 MJ 381, 385 (CMA 1987), or forgoing use of the statements. The rule of completeness is an evidentiary rule designed to promote fairness by precluding unfair omissions, not a rule intended to allow an accused to avoid the "crucible of cross-examination." *Id.*; *see also United States v. Williams*, 43 MJ 348, 354 (1995).

Appellant also contends that his sixth and seventh statements should have been admitted during cross-examination of the prosecution's expert witness, Dr. Win. Dr. Win testified on direct examination that Angela's death was due to suffocation caused by application of a choke hold about her neck. Dr. Win also gave detailed testimony about the choke hold maneuver and how its use may cause death depending on the amount and length of time pressure is applied to the carotid artery. During defense counsel's cross-examination, Dr. Win acknowledged that she could not precisely ascertain how Angela Rodriguez was suffocated because there were no signs of injury or trauma around Angela's neck. She added that this was not unusual in suffocation cases. In response to defense counsel's cross-examination, Dr. Win stated that she relied on appellant's admissions, as related to her by the Honolulu

investigators, to conclude that appellant's wife was suffocated to death by a choke hold.

A party-opponent may test the basis of an expert's opinion by inquiring into the facts and data underlying that opinion. *See* MIL. R. EVID. 703 and 705. In the present case, defense counsel was entitled to test the factual basis of Dr. Win's expert opinion as to the manner of Angela Rodriguez's death. The military judge permitted the defense to elicit testimony from Dr. Win that her conclusion was based on information obtained from appellant's confession. After the military judge allowed this line of questioning, however, defense counsel did not move to introduce the statements from appellant at issue in the present appeal under the rule of completeness. The rule of completeness under Rule 304(h)(2) is a tool that is available to the defense if the defense chooses to use it. In the absence of a defense request, the military judge was not called upon to decide whether the rule of completeness applied after references to appellant's confessions were elicited by the defense during cross-examination, and, if so, which statements by appellant were covered by the rule of completeness. Under these circumstances, there was no error.

IV. *Conclusion*

The decision of the United States Army Court of Criminal Appeals is affirmed.

SULLIVAN, Senior Judge (concurring in part and in the result):

The majority makes clear that Military Rule of Evidence 106 applies to the completion of "a writing or recorded statement," not to the completion of an oral statement. *See United States v. Goldwire*, 55 MJ 139, 146-48 (2001) (Sullivan, J., concurring in the result)(Baker, J., concurring in the result). It also makes clear that MIL.R.EVID. 304(h)(2) is the rule of completeness at courts-martial with respect to oral (and written) statements that are admissions and confessions. I agree.

In this light, I turn to the evidence of record in this case. The prosecution was allowed to evidence four pretrial statements made by appellant which were clearly exculpatory in nature. In these statements, he basically asserted that his home was invaded by several unknown persons; they beat him and his wife; and they abducted him in a car from which he eventually escaped. The prosecution declined to evidence three other exculpatory statements subsequently made by appellant, where he claimed that he killed his wife in self-defense during a domestic disturbance. Appellant sought admission of his later statements under "the rule of completeness." (R. 278)

I initially note that the Government evidenced appellant's telephone statement to his mother-in-law by calling her as a witness at this court-martial. (R. 228, 235) Trial counsel, however, also evidenced appellant's oral statement to a police emergency operator by introducing a recorded copy of their phone conversation. (R. 138, PE 43) Trial counsel further evidenced appellant's oral statement to police officers responding to his emergency call by calling one of those officers as a witness. (R. 346-48) Finally, it introduced evidence of his oral statement to a missing person police investigator by calling as a witness the investigator who heard his statement. (R. 272, 280- 82)

The military judge made a general decision that appellant's fifth, sixth, and seventh statements made to police, which suggested he acted in self-defense during a domestic row, could not be admitted by the defense under the rule of completeness. (R. 279) Neither the defense nor the Government nor the military judge distinguished between MIL.R.EVID. 106 or 304(h)(2). I think it is important that this Court do so because *these are different Manual rules with different evidentiary requirements.*

MIL.R.EVID. 106 states:

> Rule 106. *Remainder of or related writings or recorded statements*
>
> *When a writing or recorded statement or part thereof is introduced by a party*, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

(Emphasis added.) Here, the tape recording of appellant's telephone conversation with the 911 operator (his second statement) was introduced as evidence by the prosecution. Unlike *United States v. Goldwire*, *supra*, where no writing or recorded statement was evidenced, MIL.R.EVID. 106 was applicable in this case.

Nevertheless, in my view, fairness did not require that the military judge allow the defense to admit evidence of appellant's fifth, sixth, and seventh statements to members of the Honolulu police department. These statements did not clarify the telephone conversation with the 911 operator or contribute to the understanding of its meaning. They contradicted the earlier telephone call, and their admission under this rule was an obvious attempt to permit appellant to

parade his second exculpatory story before the members and avoid the crucible of cross-examination. In these circumstances, a sound basis existed for the judge's decision to refuse to admit this evidence under this evidentiary rule.

Turning to MIL.R.EVID. 304(h)(2), it states:

> (2) *Completeness.* If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce *the remaining portions of the statement.*

(Emphasis added.) For the reasons stated by the majority, I conclude that the fifth, sixth, and seventh statements were not "remaining portions of the" first four "statements." *See generally United States v. Harvey*, 8 USCMA 538, 546, 25 CMR 42, 50 (1957) (articulating a separate and unrelated rule). In addition, the first four statements made by appellant concerning his purported home invasion by strangers certainly did not constitute a confession. Although he asserted certain facts in these statements, they were exculpatory, not inculpatory, on their face. I question whether MIL.R.EVID. 304(h)(2) is applicable in these circumstances.*

A final question raised is whether the defense was entitled to introduce the entirety of these statements because the prosecution's medical expert testified on cross-examination by defense counsel that she relied on a part of these statements in determining the cause of death ("anoxic brain damage due to suffocation or choke hold kind of procedure"). (R. 419, 430-31) The witness stated: "They [the police] said that the accused had

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* *See* MIL.R.EVID. 304(c)(1)("A 'confession' is an acknowledgement of guilt."); MIL.R.EVID. 304(c)(2) ("An 'admission' is a *self-incriminating statement* falling short of an acknowledgment of guilt, *even if it was intended by its maker to be exculpatory.*") (emphasis added).

confessed to having a choke hold kind of grip on the decedent," and she said that was the only information she received from the police as to appellant's pretrial statements. (R. 433) The military judge allowed the expert to testify that she relied on this particular statement from appellant in reaching her expert opinion on the case of death. (R. 434-35)

In my opinion, no violation of MIL.R.EVID. 703 and 705 occurred in this case for the reasons pointed out by the majority. No MIL.R.EVID. 106 or MIL.R.EVID. 304(h)(2) violation also plainly occurred here. It was the defense, not the Government, who first introduced evidence of appellant's later admissions at his court-martial.

APPENDIX B

UNITED STATES ARMY
COURT OF CRIMINAL APPEALS

Before
MERCK, TRANT, and CURRIE
Appellate Military Judges

UNITED STATES, Appellee

v.

Sergeant JOSE L. RODRIGUEZ
United States Army, Appellant

ARMY 9800800

25th Infantry Division (Light) and U.S. Army, Hawaii
S. V. Saynisch, Military Judge

For Appellant: Captain Steven P. Haight, JA (argued); Major Scott R. Morris, JA; Major Jonathan F. Potter, JA (on brief); Colonel Adele H. Odegard, JA; Lieutenant Colonel David A. Mayfied, JA.

For Appellee: Captain Steven D. Bryant, JA (argued); Major Bryan T. Broyles, JA (on brief); Colonel David L. Hayden, JA; Captain Daniel Brookhart, JA.

24 October 2000

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appellant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR THE COURT:

/s/ Joseph A. Neurauter
JOSEPH A. NEURAUTER
Clerk of Court